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No. 531

In the Supreme Court of the United States

OCTOBER TERM, 1958

HARRY J. ALKER, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. 1a–37a) is reported at 260 F. 2d 135.

JURISDICTION

The judgment of the Court of Appeals (Pet. 38a) was entered on September 10, 1958, and a petition for rehearing was denied (Pet. 39a) on October 22, 1958. The petition for a writ of certiorari was filed on November 20, 1958. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the trial judge abused the broad discretion vested in him by his rulings on questions put to one of petitioner's character witnesses on cross-examination.

2. Whether the District Court committed error in first denying petitioner's motion for continuance at the beginning of the trial and later, at the conclusion of the Government's case, denying his motion for withdrawal of a juror and mistrial but granting his motion for a two-months' continuance or recess.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Constitution of the United States:

AMENDMENT V

> No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *

AMENDMENT VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, * * * and * * * to be confronted with the witnesses against him; * * *

Federal Rules of Criminal Procedure:

RULE 43

PRESENCE OF THE DEFENDANT

> The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. In

prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict. * * *

STATEMENT

On October 1, 1956, a judgment of conviction was entered against petitioner for wilful attempted income tax evasion for the years 1947, 1948, 1949, and 1950, after a 21-day trial before a jury in the Eastern District of Pennsylvania. He was sentenced to three concurrent terms of one year and one day on the first three counts and to a fine of $10,000 on each of the three counts. On the fourth count, he was given a suspended sentence and placed on probation for three years beginning at expiration of the prison sentence. (R. 1009a–1010a.) He is presently free on bail. (R. 981a.)

The amounts of net income and tax liability, as reported in the returns and as corrected, were as follows (Pet. 5a; see also Pet. 3a, fn. 3):

NET INCOME

Year	Reported	Corrected	Additional
1947	($11,238.54)	$79,450.88	$90,689.42
1948	(10,204.29)	46,968.85	57,173.14
1949	14,975.77	20,171.37	5,195.60
1950	(27,512.02)	161,224.77	188,736.79
Total	[1](33,979.08)	307,815.87	341,794.95

[1] The figures in parentheses indicate that petitioner reported a loss on his income tax returns. (Pet. 5a.)

mental and emotional anxiety (R. 9a), and asked for a hearing (R. 30a–31a) which was held on June 1 and 2, 1956 (R. 34a–198a). Judge Van Dusen stated that he would have been much more favorable to the motion if it had been received earlier than May 29, 1956, after all of the arrangements had been made (R. 109a).

At the hearing, Dr. Miller testified that petitioner had a compression fracture of two vertebrae which was incident to osteoporosis, caused by a long period of undernutrition; that petitioner was disturbed emotionally, believed to be due to the imminence of the trial and which would not be brought under control until his legal problem was settled; and that petitioner might break down emotionally under strain of trial, but that he was of the opinion that petitioner was able to undergo trial on June 4, 1956 (R. 75a–78a). In the previous two months, petitioner had gone to his business office fairly regularly (R. 183a–185a; see 791a), particularly in the preceding two weeks (R. 170a), often going in at night and on weekends (R. 175a–177a, 189a, 191a). In recent months, taxpayer had participated in four conferences with the Internal Revenue Service (R. 166a), the last conference on May 21, 1956, lasting for roughly two hours, and petitioner exhibited no sign of severe pain or inability to participate (R. 157a–158a).

Petitioner's counsel, while pressing his motion, conceded that he knew that petitioner's "whole personality would resist being tried", and that most people would

think petitioner was running true to form with delaying tactics, and that if it were not for the health reason petitioner would probably advance some other reason for a continuance (R. 110a–112a). One of petitioner's physicians stated that petitioner would not do what his doctors told him to do (R. 58a, 64a, 72a). Another of his physicians testified that such conditions generally get worse (R. 46a).[2]

After Judge Van Dusen denied petitioner's motion for continuance (R. 198a), petitioner renewed the motion before Judge Register, the trial judge, who also denied the motion (R. 199a). Petitioner was

[2] An orthopedist submitted a letter stating that petitioner should be hospitalized because of the grave fear of cancer (R. 133a–134a; see 150a), which fear was subsequently proven to be groundless (R. 541a, 565a, 670a). He did not state that petitioner could not stand trial. Petitioner's personal physician, Dr. Ronald C. Moore, testified that petitioner had had two fainting attacks and could not stand a two-weeks trial. Dr. Moore was an ophthalmologist who asserted that half of his practice was devoted to general practice (R. 86a–87a). Petitioner had previously told an agent that a great deal of Dr. Moore's activity was devoted to the brokerage business and that Dr. Moore did not spend full time in the practice of medicine (R. 169a). Petitioner had represented Dr. Moore in the latter's income tax matter (R. 87a), and Dr. Moore had testified at a number of judicial proceedings where petitioner was counsel (R. 142a). As early as 1954, Dr. Moore had advised that petitioner could not go through with a Treasury Department proceeding because the strain on petitioner affected his heart (R. 100a–101a). No such contention of a heart strain was advanced in any of the instant proceedings. Dr. Moore contended that he had received three payments of $50 each as fees from petitioner (R. 103a), but later admitted that they were in fact three $500 payments (R. 122a). In Dr. Moore's notes he refers to the petitioner as "Harry" (R. 101a).

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present during selection of the jury, the Government's opening and the swearing of the first witness (R. 199a-203a). Petitioner having agreed that the District Court now had jurisdiction of his person, asked leave voluntarily to absent himself at will during such part of the trial as he chose, pursuant to Rule 43, Federal Rules of Criminal Procedure, *supra*, pp. 2–3, without waiving his legal position. Petitioner's counsel stated that petitioner's absence would be deemed voluntary unless counsel notified the District Court of a change in petitioner so that he could no longer be considered to be voluntarily absent, in which event the District Court could then decide whether to have an examination or hearing on the alleged changed status of the matter (R. 202a–205a). Thereafter, counsel stated that petitioner had gone to the hospital for some tests, but assured the District Court that counsel had directed that nothing should be done, other than temporary treatment, which would make petitioner incapable of coming to court "unless and until opportunity was given us to present the whole matter to the Court", and the District Court made a direction to that effect (R. 239a). During the Government's presentation, the District Court was not apprised of any changed circumstances in petitioner's condition (Pet. 36a), and petitioner's counsel later said that nothing had been done at the hospital to make petitioner incapable of coming to court (R. 683a).

At the conclusion of the Government's case, petitioner moved for withdrawal of a juror or for a continuance on the ground that, the Government having rested, petitioner was unable to present his de-

fense. Petitioner's counsel stated that the question of involuntariness would not arise unless the District Court denied all of petitioner's motions (R. 656a–657a). A hearing was held on the motions (R. 536a–580a; 627a–642a, 658a–701a), after which the District Court denied the motion for withdrawal of a juror but granted a continuance or recess lasting approximately two months (Pet. 36a; R. 706a, 713a).[3] Petitioner's counsel stated as follows regarding the motion for recess or continuance (R. 710a):

> It is contemplated in my motion that the Government will not be put to the necessity of calling a single witness back to reiterate any testimony, that the Record stands as it does at the conclusion of the Government's case.

When the two-months' recess was over, petitioner made a new motion for mistrial on the ground that he was still not able to come to court and adequately defend himself (R. 992a) because of physical disability, lack of memory, and inability to concentrate and communicate with his counsel (R. 999a–1002a). Petitioner offered testimony of doctors and nurses on his physical condition, which the District Court refused to hear (R. 717a–718a, 993a), to the effect that he was going steadily down hill. Instead, the District Court appointed a psychiatrist (R. 1007a)

[3] At the hearing, the evidence showed that the prescribed treatment for petitioner was adequate nutrition and dosages of hormones (R. 547a), that during petitioner's hospitalization he had not been confined to bed (R. 539a), and that a November, 1955, X-ray had revealed that one of the fractures had existed since then (R. 663a). Dr. Miller testified that he had known many patients with such compressed fractures who were going about and doing their daily work (R. 631a).

who found no evidence in petitioner of either organic deterioration of the nervous system or of mental disease, and who stated that petitioner's consciousness was clear, his memory excellent for both recent and remote events, and that he had good mental control and superior intellect (R. 1008a).

The District Court made a finding of petitioner's mental competency, denied the motion for mistrial (R. 714a), and directed that the trial proceed, stating that for petitioner's benefit the court sessions would be unusually short (R. 722a–723a), an offer previously made at the beginning of the trial (R. 238a). Petitioner testified for three days (R. 723a–829a, 839a–858a). Repeated unsuccessful attempts were made by the court (R. 750a, 776a), by government counsel (R. 851a, 855a), and by petitioner's own counsel (R. 750a, 753a, 794a, 827a, 843a) to confine petitioner's lengthy answers to the questions asked. At the conclusion of the trial, the District Court stated that it had paid very careful attention during the presentation of petitioner's defense, and found that petitioner appeared to be of superior intellect; that his memory as to recent and remote events had been amazing at times; that his energy was rather unusual, and that during the recesses petitioner had walked about and engaged different persons in conversation, had given no sign of any discomfort or pain, had made memoranda for his counsel during the course of the trial, and in fact had actively participated in his own defense (R. 984a–985a). Petitioner's counsel stated that all of defense counsel believed that petitioner, up until the time he came back into the court room on pres-

entation of the defense's case, was unable to participate in his own defense." * * * But then there came a change, your Honor. * * * [E]very single comment your Honor made about Mr. Alker, once he came into this court room and testified and his actions here, I am in thorough accord. * * * (R. 986a.)

At his trial, petitioner presented seventeen character witnesses, some of whose testimony was stipulated, who testified as to petitioner's good reputation as a law-abiding citizen (R. 894a–911a, 927a–928a). One character witness, William J. Hamilton, Jr., a member of the Board of Revision of Taxes of Philadelphia, was cross-examined as follows (R. 900a–904a):

* * * * *

Q. Now, you have told us that you know him and know other people who know him as a good character, as a law-abiding citizen. Have you heard that he was under indictment in what is known as the Hurst estate?

A. No. No.

Q. If you had heard that, would it modify your judgment some as to his law-abiding citizenship?

A. No.

* * * * *

Q. Mr. Hamilton, have you heard that the defendant, Mr. Alker, is awaiting a hearing on disbarment proceedings in Norristown, Montgomery County?

* * * * *

Question read: If you had heard that, would it modify your judgment some as to his law-abiding citizenship?

A. No.

* * * * * *

Q. * * * Have you heard that Mr. Alker's right to practice with a Treasury Card before the Revenue Service has been withdrawn?

A. No.

Petitioner objected to these questions and moved for withdrawal of a juror and mistrial. The District Court denied the motions but immediately gave the *Michelson* instruction (*Michelson* v. *United States*, 335 U.S. 469, 472–473) to the jury as follows (R. 904a):

> Members of the jury, I instruct you that what is happening now is this: The defendant has called character witnesses and the basis for the evidence given by those character witnesses is the reputation of the defendant in the community in which he lives. Since the defendant tenders the issue of his reputation, the prosecution may ask the witnesses if they have heard of various incidents in the defendant's career. I say to you that regardless of the answers of the witness or witnesses you are not to assume that the incident asked about actually took place. All that is happening is that the witnesses' standard of opinion of the reputation of the defendant is being tested.

Petitioner's counsel agreed that there was an indictment pending in that district for income tax evasion involving the Hurst estate[4] (R. 901a). The District Court heard testimony that disbarment proceedings, brought by the Montgomery County Bar

[4] Petitioner was subsequently convicted on this indictment. *United States* v. *Alker*, 255 F. 2d 851 (C.A. 3d), certiorari denied, 358 U.S. 817.

Association, as complainants, to be passed upon by the Bar Association's Committee of Censures, a standing committee of the court (R. 936a), were actually pending;[5] that this fact was certainly known by twenty-four or twenty-five people; and that while it was not known whether others knew about it (R. 936a–939a), the District Court noted that at least the prosecutor knew about it (R. 935a). The District Court found that while the technical terminology for this proceeding was that a complaint had been filed, nevertheless, the normal, natural meaning and connotation of it was disbarment proceedings; and that the evidence showed good faith on the part of the prosecutor in asking the questions (R. 942a–943a). The Government offered to introduce evidence as to the Treasury card withdrawal, but the District Court found it unnecessary to hear it (R. 902a).

ARGUMENT

The decision of the court below, affirming the judgment of the District Court, is correct. There is no real conflict of decisions or other reason for further review.

1. Petitioner contends that the cross-examination of one of his seventeen character witnesses violated the principles declared in *Michelson* v. *United States*, 335 U.S. 469, in several respects. (Pet. 12.) The witness was questioned about three incidents:

(1) Petitioner's indictment in connection with the Hurst estate;

[5] The proceeding had not gone forward because of the testimony of petitioner's personal physician that petitioner was ill (R. 157a).

(2) Petitioner's being involved in disbarment proceedings;

(3) Withdrawal of petitioner's right to practice before the Revenue Service.

Petitioner says (Pet. 13) that there was insufficient basis for the trial court's finding that the withdrawal of the right to practice before the Treasury Department had actually occurred, and that it was not an incident likely to arouse comment among acquaintances since publication of the disbarment order had been stayed by the courts. Nevertheless, as petitioner concedes (Pet. 6, fn. 4), on February 28, 1956, prior to the instant trial, an order had in fact been issued disbarring petitioner from further practice before the Treasury Department; and the legal proceedings in the courts involving the disbarment order (*Alker* v. *Humphrey*, 247 F. 2d 22 (C.A.D.C.), certiorari denied, 355 U.S. 841) were matters of public record and certainly not secret.

Petitioner contends (Pet. 12–13) that the question as to the proceedings for petitioner's disbarment from legal practice had not progressed beyond the complaint stage. But the question asked was whether petitioner was awaiting a hearing on disbarment proceedings, not whether there had in fact been a disbarment. Petitioner, however, says (Pet. 12), this was not a disbarment proceeding at all. The District Court agreed that, while it was technically true that the proceeding was in the complaint stage, nevertheless, the normal, natural connotation of the matter was disbarment proceedings. Indeed, petitioner's counsel had previously twice characterized this same proceeding as a "dis-

barment proceeding." (R. 100a, 135a.) As to petitioner's additional complaint that since the matter was a confidential proceeding it was not likely to result in comment among acquaintances (Pet. 13), the fact was that it was known to twenty-four or twenty-five persons who were directly connected with it, and the inference that it was known to others is clear from the District Court's observation that the prosecutor also knew about it.

While the court below expressed doubts as to the contemporaneous character of the events and similarity of character defects with respect to the disbarment and Treasury card incidents, it nevertheless held that there was sufficient basis for the District Court's implicit finding that these events had actually occurred (Pet. 21a), and commented that of the three incidents it would be difficult to conceive of any having more telling effect than the Hurst indictment, the examination with respect to the latter being in every manner proper except for the hypothetical question following the initial inquiry[*] (Pet. 23a). The court below quoted *Michelson* to the effect that rarely and only on clear showing of prejudicial abuse of discretion will courts of appeals disturb rulings of trial courts on this subject (Pet. 19a–20a), and stated that it was unable to conclude that the cross-examination was prejudicial (Pet. 24a). The Court of Appeals

[*] The court below held that the hypothetical question was improper but was not reversible error, especially in view of the immediate cautionary instruction given to the jury that they were not to assume that the incidents actually took place (Pet. 20a–21a). It was no more than a technical error. Cf. *United States v. H. Wool & Sons*, 215 F. 2d 95, 98–99 (C.A. 2d).

held that while it had found "some trace of impropriety" (Pet. 22a), nevertheless the evidence was so strong that no jury could have acquitted (Pet. 23a) and the cross-examination did not have a substantial influence upon the verdict within the purview of *Kotteakos* v. *United States*, 328 U.S. 750 (Pet. 24a).

As stated in *Michelson* v. *United States*, *supra*, at p. 479, cross-examination may test the sufficiency of the basis of the witness' knowledge so that "* * * he may be required to disclose rumors and reports that are current even if they do not affect his own conclusion. It may test the sufficiency of his knowledge by asking what stories were circulating concerning events, such as one's arrest, about which people normally comment and speculate." It would appear that the incidents involved here were as probative to test the witness' standard of opinion as, say, an arrest which may not have culminated in a conviction, or which may even have been a false arrest. *Michelson* v. *United States*, *supra*, at p. 482. We submit that there was no abuse of the wide discretion allowed the trial judge in the broad area of cross-examination of character witnesses. *Gordon* v. *United States*, 344 U.S. 414, 420, fn. 13.[7]

[7] Petitioner, in also contending (Pet. 16–17) that the decision in the instant case conflicts with decisions of other courts of appeals, says that *Michelson* marked the extreme limits of cross-examination and that the District Court, as a matter of law, had no discretion to permit questions beyond the scope of *Michelson*. The court below stated (Pet. 20a) that the standards of *Michelson* should neither be termed maximum nor minimum measures, and that the peculiar factual situation presented should govern. This statement is in conformity with the broad discretion vested in the District Court as enunciated

2. Petitioner next contends that his motions for continuance made at the beginning of the trial should have been granted, and that the harm done by failure to grant the earlier motions was compounded by failure to grant the motion for withdrawal of a juror and mistrial made at the conclusion of the Government's case (Pet. 17–18). Petitioner made his motions on four occasions: (1) before trial to Judge Van Dusen, (2) at the beginning of the trial to Judge Register, (3) at the close of the Government's evidence, and (4) after the two-months' recess. They were all based on petitioner's alleged physical and mental disability to stand trial. Petitioner had agreed to abide by the opinion of Dr. Miller, an eminent physician, as to whether petitioner could go to trial. When Dr. Miller said that petitioner was able to be tried, petitioner, at the eleventh hour, filed a motion for continuance and asked for a hearing which was accorded him. Petitioner admittedly had two compression fractures of vertebrae, due to lack of proper nutrition. But he had had one of them since at least November, 1955, and he had been going to his office and conducting some of his legal business up until a week before trial. Dr. Miller later testified that he had known many patients with such compression fractures who were going about and doing their daily

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in *Michelson* (335 U.S. at 480): "Both propriety and abuse of hearsay testimony, on both sides, depend on numerous and subtle considerations difficult to detect or appraise from a cold record, and therefore rarely and only on clear showing of prejudicial abuse of discretion will Courts of Appeals disturb rulings of trial courts on this subject." See *Gordon* v. *United States*, 344 U.S. 414, 420, fn. 13.

work (R. 631a). Petitioner says, however, that his pre-trial motion was also based on Dr. Miller's diagnosis and prognosis of petitioner's mental and emotional anxiety (Pet. 8), and that Dr. Miller had conceded that petitioner might break down under the strain of trial (Pet. 19). However, Dr. Miller stated that the emotional condition was due largely to the imminent trial, and that he did not believe that this aspect of petitioner's condition would be brought under control until petitioner's legal problems had been settled, and that from a physical standpoint petitioner was able to stand trial (R. 75a–76a).

Petitioner was present at the trial until the first witness had been sworn, and then voluntarily absented himself as authorized by Rule 43, Federal Rules of Criminal Procedure, *supra*, pp. 2–3. His counsel represented to the District Court that nothing would be done during petitioner's absence to make petitioner incapable of coming to court; the District Court made a direction to the same effect; each day a renewed assurance was given the District Court that petitioner's absence was voluntary (Pet. 36a, fn. 100); and petitioner's counsel later assured the District Court that nothing had in fact been done during the Government's case to cause petitioner's absence to be involuntary.

At the close of the Government's case, petitioner's motion for mistrial was denied but his motion for a continuance or recess was granted, petitioner's counsel stating that the Government would not be put to the necessity of calling back a single witness. Following the recess, petitioner again contended that he was not

physically or mentally fit for trial and again moved for a mistrial. After a psychiatrist's examination had concluded that petitioner had no mental disease and that his memory was excellent, the District Court denied the motion and ordered the trial to proceed. Petitioner took the stand and neither Government counsel, the District Court, nor petitioner's own counsel was able to curtail his lengthy explanations. At the end of the trial, the District Court found that petitioner's memory was excellent, his energy was unusual, he had given no sign of discomfort or pain, and had actively participated in his own defense. Petitioner's counsel agreed:

The court below, while stating that the long delay had caused it much concern although it had not been specifically urged as error by petitioner, found that petitioner's acts had precipitated the unfavorable situation and that there was no showing that petitioner's rights were in any manner prejudiced (Pet. 37a). For the same reasons, petitioner's motions for withdrawal of a juror and mistrial at the end of the Government's case and also after the two-months' recess were properly denied. While it is true that petitioner was subject to various maladies, nevertheless his doctors had not been able before trial to make him do what they directed him to do. It was not until petitioner was found fit to stand trial and ordered to do so that he went to the hospital, voluntarily absenting himself from the trial, and laying the foundation for the present allegations of error. Petitioner's doctor testified that petitioner was not confined to his bed while he was in the hospital during this period. As

his own counsel said at one point, most people would think petitioner was running true to form with delaying tactics, and that if it were not for the health reasons, petitioner would have advanced some other reason for a continuance. Indeed, two years earlier, in 1954, petitioner had similarly sought to thwart the holding of a Treasury Department proceeding by contending that he was ill, thereafter unsuccessfully seeking reversal of the disbarment order because of the denial of a continuance. *Alker* v. *Humphrey*, 247 F. 2d 22 (C.A.D.C.), certiorari denied, 355 U.S. 841.

It has long been settled that an application for a continuance is a matter of discretion of the District Court not subject to review unless it is clearly shown that such discretion has been abused. *Avery* v. *Alabama*, 308 U.S. 444; *Hardy* v. *United States*, 186 U.S. 224, 225–227; *Goldsby* v. *United States*, 160 U.S. 70, 72; *Isaacs* v. *United States*, 159 U.S. 487, 489. The District Court accorded full hearings on the various motions for continuance and withdrawal of a juror before trial and at the conclusion of the Government's case, and its denial of another hearing on the same issues after the two-months' recess when petitioner had again contended that he was not physically or mentally able to stand trial was proven to be justified when petitioner thereafter took the stand and vigorously defended himself. We submit that under the circumstances of this case, the District Court exercised a reasonable discretion in the matter and petitioner should not be heard to complain of the refusal of the District Court to grant his motions for continuance and mistrial.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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